



## H.R. 12 – Paycheck Fairness Act

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### FLOOR SITUATION

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This week, the House is expected to consider H.R. 12, which will require a majority vote for passage. Section 5 of H.Res. 5 (the House rules package) provided for the consideration of H.R. 11 (Lilly Ledbetter Fair Pay Act) and H.R. 12 (Paycheck Fairness Act) under a closed rule. The rule waives all points of order against the bill, except those arising under clauses 9 and/or 10 of rule XXI (Earmarks and PAYGO). The rule provides for one hour of debate, equally divided between the Majority and the Minority, and one motion to recommit. In addition, the rule requires the Clerk, in the engrossment of H.R. 11, to include the text of H.R. 12 prior to final passage. This legislation was introduced by Representative Rosa DeLauro (D-CT) on January 6, 2009. The bill was referred to the House Committee on Education and Labor, but was never considered.

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### SUMMARY

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H.R. 12 contains numerous provisions designed to expand the federal role in enforcing gender pay equity in the workplace, including:

- The bill would amend the Fair Labor Standards Act (FLSA) regarding gender pay equity to allow for pay disparities based on “a *bona fide* factor such as education, training, or experience...***only if the employer demonstrates***” that the factors are not gender-based, is job-related, and constitutes a “business necessity.” If “an employee demonstrates that an alternative employment practice exists that would serve the same business purpose,” the defense will not apply and the employer would be held in violation of the law. Some Members may be concerned that the language would shift the burden of proof from the employee to the employer, and, by holding employers liable where “an alternative employment practice exists,” would allow employees to dictate workplace practices to employers.
- The bill would expand the definition of “same establishment” to include multiple locations of a business “located in the same county or similar political subdivision of a state,” and would permit the Equal Employment Opportunity Commission (EEOC) to write a more expansive definition in regulation. Some Members may be concerned that these provisions would allow for “apples-to-oranges” comparisons across geographic areas that will invite unwarranted lawsuits by employees.
- The bill would expand current law prohibitions on retaliation by employers to protect any employee who has testified or “participated in any manner” in any pay investigation, “has served or is planning to serve on any industry committee,” or “has inquired about, discussed, or disclosed the wages of the employee or another employee.” Some Members may be concerned that these broad provisions could make virtually all employees subject to the anti-retaliatory provisions, impeding employers’ ability to take legitimate disciplinary actions against their workers.
- The bill would allow for unlimited compensatory and punitive damages against employers found in violation of the pay equity provisions, except that the United States shall not be held liable for any punitive damages. The bill also would expand current law to include expert fees as part of the recovery fees paid to successful plaintiffs by employers. Some Members may be concerned that this provision could hamper businesses, particularly small businesses, with high legal damages and fees, potentially discouraging hiring during an economic downturn.



- The bill would exempt pay equity class action lawsuits from the current law requirement (delete extra space)that each plaintiff must provide written authorization to be added to the lawsuit. Some Members may consider this provision a boon to trial lawyers, and be concerned that unwitting employees could become dragged into contentious class action lawsuits without their knowledge or consent.
- The bill would permit the Department of Labor to supervise the award of any compensatory or punitive damages awarded with respect to any pay equity claim, and permit the Department to bring suit to recover such damages from employers.
- The bill would authorize training for EEOC employees and affected individuals and companies regarding pay discrimination.
- The bill would create a new grant program administered by the Departments of Labor and Education that would award funds to states, public entities, and non-profit organizations to carry out negotiating skills training programs for girls and women. The bill also requires the Departments of Education and Labor to incorporate similar skills training into existing programs authorized under the No Child Left Behind Act, Perkins Vocational and Technical Education Act, Higher Education Act, and Workforce Reinvestment Act.
- The bill requires the Department of Labor to provide information and research to the public “concerning the means available to eliminate pay disparities between men and women,” and establishes a National Award for Pay Equity in the Workplace to recognize employers or labor organizations that have made a “substantial effort” to eliminate gender pay disparities.
- The bill requires the EEOC to issue regulations to require the collection of pay data from employers “as described by the race, sex, and national origin of their employees.” Some Members may be concerned that these provisions would present an unfunded mandate on business and create undue paperwork burden for employers.
- The bill requires the Bureau of Labor Statistics to collect data on women workers, and requires the Department to make information on pay discrimination publicly available.
- H.R. 12 also requires the Office of Federal Contract Compliance Programs to “use the full range of investigatory tools at the Office’s disposal” in investigating federal contractors regarding pay disparity issues. In particular, the bill states the contract compliance office “shall not limit its consideration to a small number of types of evidence” and “shall not require a multiple regression analysis or anecdotal evidence” from a pay discrimination case. The bill also reinstitutes the Equal Opportunity Survey, which will be required to be completed by at least half of all federal contractors. Some Members may be concerned that these provisions may encourage additional lawsuits against federal contractors and present additional paperwork burdens on employers participating in federal contracting activities.
- The bill authorizes \$15 million in appropriations to implement its provisions, authorizes technical assistance for small businesses, and exempts small businesses from the bill’s mandate to the extent that small businesses are exempt from the Fair Labor Standards Act. Under current law, a small business whose only employees are the owner and his or her spouse, parent, child, or “other member of the immediate family of such owner” is exempt from FLSA requirements; this limited exception would be maintained in H.R. 12.
- The bill includes language maintaining current law requirements on both employers and employees to comply with federal immigration law.



# LEGISLATIVE DIGEST

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## COST

A formal CBO score is unavailable; however, the bill text would authorize \$15 million in expenditures.

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## STAFF CONTACT

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